Encl. 16

OGC 7-0660a

2 May 1957

MEMORANDUM FOR: Mr. Houston

SUBJECT : Veterans' Preference Act - Applicability to CIA

1. The Veterans' Preference Act places veterans in a preferred position in regard to separation from Federal employment in cases of reductions in force. In addition, the Act and the Civil Service Commission's regulations prescribed thereunder, set up reduction in force procedures and employee preferences therein which cover non-veterans as well as veterans. This Agency has, as a matter of practice, followed the requirements of the Veterans' Preference Act in regard to termination, re-employment, etc., except in cases of separation under the authority granted in Section 102(c) of the National Security Act. To date there has been no resolution or even a test of the question whether or not the Act is applicable to the Agency. The Department of Justice has expressed the informal opinion that separations under Section 102(c) are in no way subject to the Veterans' Preference Act inasmuch as the former is special legislation and takes precedence over the latter Act which is general legislation.

2. There have been at least two cases in the courts concerning separations of employees under a special legislative authority substantially the same as that granted the Director of Central Intelligence by Section 102(c) of the National Security Act. Those cases are Scher v. Weeks (Tab A), in which the separation was based upon authority in the Department of Commerce Appropriation Act of 1953 (66 Stat. 549, 567), and Service v. Dulles (Tab B), in which the separation was based upon authority in the Department of State Appropriation Act of 1950 (63 Stat. 447, 456). Although the question of veterans' preference did not arise in either case, the court in each case held that the statutory language left absolute discrimination in the head of the Department and the reasons for the exercise of his discretion were immaterial. The ruling in the Service case seems particularly important because the Secretary of State admittedly exercised his discretion to separate Service because of a finding of the Civil Service Commission Loyalty Board which was held by the court to be a nullity. A Supreme Court decision on the Service case is pending, but because of the peculiar facts in regard to the Loyalty Board finding, a reversal probably will not materially affect the position or authority of this Agency under Section 102(c) of the National Security Act.

3. In Myers v. Hollister (Tab C), the separation of a veterans' preference eligible under a special authority in the Mutual Security

Act of 1952 was upheld by the court. It is probable that Mr. Donald B. MacGuineas, who expressed the informal opinion of the Department of Justice mentioned in paragraph one above, based his opinion on the finding of the court in the Myers' case. There the court held that the special statutory authority granted to the Director of Mutual Security overcame the Veterans' Preference Act which occupied the position of a general law. The special authority granted to the Director of Mutual Security would not seem to be as broad as that granted the Director of Central Intelligence under Section 102(c) of the National Security Act or that granted by almost identical language in the Department of State and Department of Commerce Appropriations Act mentioned above. Clearly, Mr. MacGuineas' opinion, based upon an analogy, is a reasonable one.

4. Another point of interest in the Scher and Service cases is the statement of the court in each case that it should be noted that Appellant's discharge carries no implication that he might be either disloyal or a security risk. While the discretionary separation authority granted to State and Commerce is virtually identical with that granted the Director of Central Intelligence in the National Security Act, it is noteworthy that the latter authority contains a provision that a termination under it shall not affect the employee's right to employment elsewhere in the Government. Clearly, the court read into the State and Commerce authorities the same proviso. It might be said, then, that in the Scher and Service cases we have, by analogy, a judicial ruling that the authority in Section 102(c) of the National Security Act was not intended to be used only in security and loyalty cases. On that basis a more general use of the Director's special authority than has been the practice in the past, might well be justified. Whether obvious political considerations should caution against use of Section 102(c) authority in all separations from the Agency is another matter.

5. While Mr. MacGuineas expressed the opinion that there were no restrictions in the use of the 102(c) authority, he also cautioned that we should be certain that our own regulations did not unnecessarily restrict our separation procedures. He felt that if, by regulation, we adopted Civil Service Commission procedures, we would be bound by them. A review of the several regulations governing personnel policies, separations and grievance procedures indicates that we are probably in pretty good shape on this particular point. Regulation 20-740, which provides for separations under Section 102(c), does not contain any restrictions; and although it provides for an Employment Review Board, this provision is discretionary and still leaves to the Director the authority to discharge without ERB procedures or without regard to the advice of the Board. The regulation quotes Section 102(c) of the National Security Act but fails to cite the law. It would be preferable if the law were cited as well as quoted. Most of the other regulations governing separations and related matters contain a saving clause providing that the procedures prescribed therein shall have no effect on separations under R 20-740. Such a saving clause does not appear in R 20-13 (Separation for Military Service), and R 20-130

(Discrimination in Employment). It is doubtful that any harm is done by the omissions, but consideration should be given to including a reference to R 20-740 in each.

6. The most noteworthy omission in the series of regulations on separation is one on reduction in force procedures. Bertha Bond of the Office of Personnel advises that several years ago a proposed regulation on this subject was drafted but for various reasons, including the problem of the rumors which such a regulation might start, it was filed without action. Both R 20-8, paragraph B(2)(a) and proposed R 20-670, paragraph 2 make reference to veterans' preference and reductions in force and in doing so at least infer that Civil Service Commission regulations are controlling in such cases. This raises a question as to whether or not we should delete such references from our regulations in order to give us a freer hand in reductions in force and veterans' preference cases when we may not desire to follow Civil Service Commission procedures. This is not to say that the referenced regulations would preclude separations in such cases under Section 102(c) of the National Security Act, especially in view of the several court rulings on similar statutory authorities mentioned above. However, if we have any intention of using Section 102(c) for such cases, we would probably be well advised to delete from our regulations any reference to the procedures prescribed by the Civil Service Commission under the Veterans' Preference Act.

JOHN D. MORRISON, JR.
Office of General Counsel

Attachments

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OGC 7-0660

26 April 1957

MEMORANDUM FOR: Deputy Director (Support)

ATTENTION: Mr. Hornberger

SUBJECT: Downgrading or Separation of Preference Eligibles

1. The question whether the Veterans Preference Act has any application to this Agency has never been tested. The Department of Justice has expressed the informal opinion that separations under the Director's authority under 102(c) of the National Security Act of 1947 are in no way subject to the Veterans Preference Act.

2. The downgrading situation is less clear. We may have an argument based on section 10(a) of the Central Intelligence Agency Act of 1949, which provides that notwithstanding any other provisions of law we may spend funds for personal services. How good this argument would be in connection with the Veterans Preference Act is problematic. In the past we have taken a position in a couple of cases that we would follow the Veterans Preference Act as a matter of policy, but we have not determined that it is controlling as a matter of law. I think we should maintain this position on the question of law.

3. In connection with the downgrading of a returnee from overseas, I feel there is no question that he can be informed that he is not performing satisfactorily in his present grade and he will, therefore, be terminated under the Director's authority. If he chooses thereupon to take a position at a lower grade, this is his voluntary act and not subject to appeal.

4. A revised version of Regulation 20-670 [illegible] and separations is in process. We are [illegible] our own regulations [illegible] authority to the [illegible] actions.

5. Our position in regard to the exemption from the Veterans Preference Act may be affected by the imminent Supreme Court decision in the John S. Service case, but we do not believe it will make a material difference in our approach. That case was based on a unique set of facts which could not work under the present loyalty program.

/s/

LAWRENCE R. HOUSTON
General Counsel

Att: Personnel statement
on same subject

cc: Office of Personnel
OGC chrono
subject-Per 16-C.R. Per 3
OGC:LRH:jeb

CIA INTERNAL USE ONLY

TAB A

SCHER v. WEEKS, 231 F.2d 494
(U.S.C.A. for D.C. decided January 19, 1956)

This is an action by a discharged employee of the Department of Commerce to have his removal declared illegal. No question of veterans' preference appears in the report.

Scher was discharged by the Secretary of Commerce under the authority of section 304 of the Department of Commerce Appropriation Act of 1953 (66 Stat. 549, 567). This statute was virtually identical with the authority of the DCI under the National Security Act and the Secretary of State under a provision of several State Department Appropriation Acts including the authority under which Secretary Acheson discharged John Stewart Service.

Scher sought a decree holding the statute unconstitutional, declaring his removal illegal in any event and requiring reinstatement. The constitutionality of the statute was upheld and the discharge declared legal since the Secretary complied with the terms of the statute. A footnote points out that Scher's discharge carries no implication that he may be either disloyal or a security risk.

SERVICE v. DULLES, 235 F. 2d 215
(U.S.C.A. for D.C. decided June 14, 1956)

This decision upheld the discharge of the employee under the authority of State Appropriation Act language virtually identical with the Director's authority and that of the Secretary of Commerce used in the Scher case. The defense raised different issues in this case because of previous reviews of charges against Service by the Loyalty Security Board of the Department of State and decisions that no reasonable doubt existed as to his loyalty to the U.S. Subsequently, the Loyalty Board of the Civil Service Commission held that there was reasonable doubt about Service's loyalty. The Supreme Court in Peters v. Hobby, 349 U.S. 341 (1955) held that the Civil Service Commission Board was limited to review of cases of persons recommended for dismissal by the Loyalty Boards of their departments. Therefore, the decision of the Civil Service Commission Board was a nullity and the defense claimed that Secretary Acheson's action in dismissing Service, admittedly on a determination based on the Civil Service Review Board's findings, was illegal. The District Court held and the Court of Appeals affirmed in this decision that regardless of the basis for Secretary Acheson's determination he had authority under the broad language of the Appropriation Act to discharge Mr. Service. The Court said that it could not review the correctness of the Secretary's determination and that its function was limited to determining whether proper procedural requirements of the statute had been followed. The only procedural requirement of the statute was a determination in the discretion of the Secretary that the termination was necessary and advisable in the interests of the U.S. That determination the Secretary made.

A footnote to the decision states that since the finding of the Review Board is a nullity and Service's discharge is sustained only under the broad discretion granted in the Appropriation Act that the quotation from note two in Scher v. Weeks would seem equally applicable in this case:

> "It should be noted, however, that in the case at bar appellant's discharge carries no implication that he might be either disloyal or a security risk."

MYERS v. HOLLISTER, 226 F.2d 346
(U.S.C.A. for D.C., decided September 1, 1955)

This is an action by a veteran preference eligible in the classified competitive Civil Service employed by the Mutual Security Agency seeking to have his discharge set aside and to be restored to his position. In Section 7(f) of the Mutual Security Act of 1952, 22 U.S.C.A. 1655(d), it was required that the Director of Mutual Security reduce personnel in the agency by five per cent. The following proviso was included:

> "Provided further, That after the Director [of Mutual Security] has determined the reduction to be effected in each agency, the determination as to which individual employees shall be retained shall be made by the head of the agency concerned."

Plaintiff's appeal to the Civil Service Commission was dismissed on the ground that under the MSA proviso his discharge was within the statutory authority of the Director. The District Court dismissed his complaint on the basis of the MSA proviso.

A court of appeals stated that to uphold the plaintiff's contention that the proviso was subject to the limitations in the Veterans' preference Act would deprive the language of the former statute of its essential meaning. The court then looked at the legislative history of the MSA which included the following:

> "The head of each agency is thereafter to determine in his own discretion which employees he will retain as most capable of carrying out the program, without regard to existing statutes, regulations and procedures for reduction in force."

The court of appeals on the basis of the statutory language and the legislative history ruled that the proviso was intended to give broad discretionary power to discharge employees without regard to existing statutes, regulations and procedures for reduction in force. It concluded with the following language:

> "We further conclude that in the matter of reductions in force in Federal agencies, contrary to what appellant argues, the Veterans' Preference Act occupies the position of a general law and the MSA proviso that of a special law, applying only to one particular reduction in force in one specified agency and not impairing or affecting in any way the rules applicable to reductions in force in other agencies or even in MSA beyond the five per cent reduction in force ordered by Congress in the Mutual Security Act of 1952. As such, the proviso must prevail. MacEvoy Co. v. United States, 1944, 322 U.S. 102, 64 S.Ct. 890, 88 L.Ed. 1163; Shelton v. United States, 1947, 83 U.S.App.D.C. 32, 165 F.2d 241.

(Judge [illegible] for the Court)

NATIONAL SECURITY ACT of 1947 (61 Stat. 495, 498)

SECTION 102(c). Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the DIRECTOR OF CENTRAL INTELLIGENCE may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States, but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the government if declared eligible for such employment by the United States Civil Service Commission.

DEPARTMENT OF STATE APPROPRIATION ACT, 1950 (63 Stat. 447, 456)

SECTION 104. Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Secretary of State may, in his absolute discretion, during the current fiscal year, terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States.

TAB D

DEPARTMENT OF COMMERCE APPROPRIATION ACT, 1953 (66 Stat. 549, 567)

SECTION 304. Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Secretary of Commerce may, in his absolute discretion, during the current fiscal year, terminate the employment of any officer or employee of the Department of Commerce whenever he shall deem such termination necessary or advisable in the best interests of the United States.

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